



Date: April 12, 1999

Case No. 1999-INA-85

In the Matter of:

BROWARD EDUCATION CENTER, INC.
d/b/a CROSSROADS SCHOOL
Employer,

On behalf of:

LYNETTE B. VAN HEITJZEN,
Alien.

Certifying Officer: Floyd Goodman
Atlanta, GA

Appearance: Jeannette Mirabal, Esq.

Before: Holmes, Lawson and Wood
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.¹ After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) issued a Final Determination

¹The following decision is based on the record upon which the CO denied certification, including the Notice of Findings (NOF), rebuttal and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

(FD) denying the application, the Employer requested review pursuant to 20 CFR § 656.26.²

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

THE PROCEEDINGS

Employer seeks to fill the position of Elementary and Secondary Math Teacher, ADHD and ADD with DOT Title Teacher, Mentally Impaired, DOT # 094.227-022, a wage offer of \$3,000 per month, job duties of:

Teach elementary and secondary students with Attention Deficit and Hyperactivity Disorder (ADHD) and Attention Deficient Disorder (ADD) courses in mathematics. Prepare outlines for course of study, lecture, demonstrate and use audiovisual teaching aids. Prepare, administer and correct tests, assign lessons, correct papers and counsel students. Constantly evaluate students and counsel parents for a combined effort to assure maximum academic achievement levels in mathematics curriculum. Customize teaching plans to the specialized needs and medications of students and perform other functions necessary to the teaching and management of ADHD/ADD math classes. (AF 174)

Minimum requirements were stated as a Master's degree in Mathematics and four years of experience in the job offered. (AF 174)

Other special requirements included:

One year required experience must be in teaching mathematics to ADHD and ADD student classes. Total teaching experience must be at least four years, including one year as above. (AF 174)

The application was denied by the CO on the basis that the employer's educational and

²Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

experience requirements were unduly restrictive. (AF 66) Based on the DOT title, the job offered qualified as a level seven SVP with a maximum of over two years up to and including four years of education, training, and experience, contrary to the employer's combined eight years of education and experience. (AF 158) In rebuttal, employer argued that the DOL classification should be amended to that of "Supervisor, Special Education" (#094.167-010) which constitutes a SVP level of eight and justifies the employer's educational and experience requirements. (AF 71-72) After further review of the job description and the fact that the job focuses on teaching children with neurological problems and not with mental impairments, the CO did concur that the DOT title assigned by the state was not the most appropriate, but found that the job classification that was best suited for the position was "Teacher, Learning Disabled (#094.227-030). (AF 66) Employer's DOT classification was found to be inappropriate since job duties were not supervisory in nature. (AF 66) Thus, with the assignment of the new DOT classification, the employer was still found to be in violation of § 656.21(b)(2).

CONTENTIONS ON APPEAL

On appeal, employer contends, among other things, that the most appropriate DOT classification for the available position is "Supervisor, Special Education". (AF 2) Countering the CO's point that the job is not supervisory in nature, employer asserts that the duties of the job require that the students' parents be supervised. (AF 2-3) Employer contends that the nature of ADD/ADHD disorders necessitates parental supervision in order to adequately fulfill the role of teacher. (AF 2-3)

DISCUSSION

The application specified a job title of "ELEMENTARY AND SECONDARY MATH TEACHER, ADHD AND ADD" which the state agency classified as "Teacher, Mentally Impaired"³. (AF 174) The NOF found the job requirements excessive and directed:

³094.227-022 TEACHER, MENTALLY IMPAIRED (education)

Teaches basic academic and living skills to mentally impaired students in schools and other institutions: Plans curriculum and prepares lessons and other instructional materials according to achievement levels of students. Confers with parents, administrators, testing specialists, social workers, and others to develop individual educational program for students who are at different learning ability levels, including educable, trainable, and severely impaired. Instructs students in academic subjects, utilizing various teaching techniques, such as phonetics, multisensory learning, and repetition to reinforce learning. Instructs students in daily living skills required for independent maintenance and economic self-sufficiency, such as hygiene, safety, and food preparation. Observes, evaluates, and prepares reports on progress of students. Meets with parents to provide support and guidance in using community resources. May administer and interpret results of ability and

Corrective Action Required:

The employer must prove business necessity for requirements in excess of four (sic) in accordance with the following business necessity definition:

The regulations strictly prohibit restrictive job requirements and combinations of jobs unless business necessity is clearly documented. To establish business necessity an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner. Mere inconvenience to the employer or somewhat higher operating costs arising from the use of a worker who does not meet the requirements in question, does not amount to business necessity. (AF 158)

In agreeing that the state agency classification was inappropriate, but rejecting employer's evidence supporting classification as "Supervisor, Special Education"⁴ and instead reclassifying as "Teacher, Learning Disabled"⁵, the CO in the FD discounted the statements of an Associate Dean

achievement tests. May be required to hold state certification.

GOE: 10.02.03 STRENGTH: L GED: R5 M4 L5 SVP: 7 DLU: 86

⁴094.167-010 SUPERVISOR, SPECIAL EDUCATION (education)

Directs and coordinates activities of teachers and other staff providing home or school instruction, evaluation services, job placement, or other special education services to physically, mentally, emotionally, or neurologically handicapped children: Reviews referrals and diagnoses and participates in conferences with administrators, staff, parents, children, and other concerned parties to formulate recommendations for student placement and provision of services. Monitors staff activities and gives technical assistance in areas, such as assessment, curriculum development, use of materials and equipment, and management of student behavior. Plans and conducts in-service training. Interviews applicants, recommends hirings, and evaluates staff performance. May write grant proposals. May assist program administrators in preparation of budget and development of program policy and goals. May address public to elicit support and explain program objectives.

GOE: 10.02.03 STRENGTH: L GED: R5 M4 L5 SVP: 8 DLU: 86

⁵094.227-030 TEACHER, LEARNING DISABLED (education)

Teaches elementary and secondary school subjects in schools, institutions, or other specialized facilities to students with neurological problems in learning: Plans curriculum and prepares lessons and other instructional materials to meet individual need of students, considering state and school requirements, physical, emotional, and educational levels of development. Confers with parents, administrators, testing specialists, social worker, and others to develop individual educational program for student. Instructs students in all academic subjects. Creates learning materials geared to each student's ability and interest. Instructs students, using special educational strategies and techniques, to improve sensory-

(College of Education) at Florida International University, a licensed Psychologist and the Director of Exceptional Student Education at Barry University, stating:

However, these individuals are not within the industry or field of Elementary or Secondary Education. The employer did not produce documentation that these requirements are the standard within the industry and that similar employers commonly list these same requirements. (AF 66)

This in itself warrants remand. Clearly the FD denied certification based upon standards which were not annunciated in the NOF. The NOF must specify what the employer must show to rebut or cure the CO's findings; otherwise the employer is deprived of a full opportunity to rebut. *Peter Hsieh*, 88-INA-540 (Nov. 30, 1989) Moreover it appears that employer's experts were qualified to speak to the issue of standards for the job involved, and that they presented substantial evidence of a need for requirements in excess of those found in the FD. On remand, the employer should be given the opportunity to present evidence of the character described in the FD, which evidence should be considered together with the expert evidence already presented on the issues of appropriate classification and business necessity for requirements in excess of the DOT SVP.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **REMANDED FOR ACTION CONSISTENT WITH THE DECISION HEREIN.**

For the Panel:

JAMES W. LAWSON
Administrative Law Judge

motor and perceptual-motor development, perception, memory, language, cognition, and social and emotional development. Works with students to increase motivation, provide consistent reinforcement to learning, continuous assessment of level of functioning, and continuous feedback to student for all learning activities. Works with parents to accept and develop skills in dealing with student's learning impairment. May work as consultant, teach in self-contained classroom, or teach in resource room. May be required to hold certification from state.

GOE: 10.02.03 STRENGTH: L GED: R5 M4 L5 SVP: 7 DLU: 81

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

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